

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
August 5, 2002 Session

**MARY B. HARRIS v. STEVEN R. ABRAM, ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 00C-3570 Marietta Shipley, Judge**

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**No. M2001-02192-COA-R3-CV - Filed November 22, 2004**

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The plaintiff filed this medical malpractice action against her neurosurgeon and his practice after her colon was perforated during a surgical procedure on her spine. The defendants filed a motion for summary judgment supported by an affidavit of the neurosurgeon stating that he complied with the recognized standard of acceptable professional practice applicable to neurosurgeons. The plaintiff filed a response relying on the depositions of her own expert to refute the neurosurgeon's affidavit. The trial court determined that the opinion of the plaintiff's expert failed to meet the requirements of Tenn. Code Ann. § 29-26-115(a)(1) and (2) and granted the motion for summary judgment. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

BEN H. CANTRELL, P.J., M.S., PATRICIA J. COTTRELL, J., and JOHN H. GASAWAY, III, Sp. J., delivered the opinion of the court.

Hugh P. Garner, Chattanooga, Tennessee, for the appellant, Mary B. Harris.

C.J. Gideon and Edward A. Hadley, Nashville, Tennessee, for the appellees, Steven R. Abram, and Neurological Surgeons, P.C.

**MEMORANDUM OPINION<sup>1</sup>**

**I.**

On March 19, 1997, Mary B. Harris was admitted to St. Thomas Hospital suffering from severe lower back and left leg pain. She was seen by Dr. Steven R. Abrams, a neurosurgeon, who diagnosed her with a recurrent herniation with free fragmentation of the vertebral disc at L4-L5. The following day, Dr. Abrams performed a lumbar laminectomy on Ms. Harris. Following the surgery,

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<sup>1</sup>Tenn. Ct. App. R. 10 provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Ms. Harris complained of severe abdominal pain. A CT scan of her abdomen revealed free intraperitoneal and pelvic fluid. Dr. Eugene P. Chambers immediately performed exploratory surgery which revealed a small bowel perforation. Dr. Chambers performed a bowel resection to repair the perforation, and Ms. Harris was discharged from St. Thomas Hospital on March 31, 1997.

In 1998, Ms. Harris filed a complaint against Dr. Abrams and Neurological Surgery, P.C. asserting that Dr. Abrams “violated the standard of care for spinal surgery when he cut into and perforated the bowel.” The case was tried in December of 1999. At the close of the plaintiff’s proof, the trial court granted the defendants’ motion for a directed verdict with respect to Ms. Harris’s claims for lost income, lost earnings, and medical and hospital expenses. The trial court took the remainder of the defendants’ motion for a directed verdict under advisement. The following morning Ms. Harris voluntarily dismissed her remaining claim for personal injury.

On December 7, 2000, Ms. Harris refiled essentially the same complaint against Dr. Abrams and Neurological Surgery, P.C. On January 26, 2001, the defendants filed a motion for summary judgment asserting that (1) the plaintiff’s claims for lost income, lost earnings, and medical and hospital expenses are barred by the doctrines of res judicata and collateral estoppel due to the directed verdict in the prior suit and (2) Dr. Abrams complied with the recognized standard of acceptable professional practice applicable to neurosurgeons practicing in Nashville, Tennessee. The motion was supported by the affidavit of Dr. Abrams. The plaintiff responded by submitting two depositions of Dr. Alan B. Lippitt, an orthopedic surgeon practicing in Atlanta, Georgia.

The trial court first determined that the plaintiff’s claims for lost income, lost earnings, and medical and hospital expenses were determined in the first suit and cannot be revived by a voluntary non-suit. The trial court then concluded that Dr. Lippitt failed to “opine exactly what the standard of care is and that the defendant ‘acted with less than or failed to act with ordinary and reasonable care in accordance with such standard.’” The trial court granted the motion for summary judgment and dismissed the case on August 3, 2001.

## II.

The plaintiff raises two issues on appeal :

- (1) Whether the trial court erred in holding that the directed verdict in the “first” case as to plaintiff’s claim for lost wages, medical expenses and future medical expenses precluded plaintiff from claiming those same damages where no certification was made pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.
- (2) Whether the trial court erred in holding that plaintiff’s expert witness was not competent to offer proof sufficient to refute Defendant Abram’s affidavit that he complied with the standard of care because Plaintiff’s expert did not practice the specialty of neurosurgery in 1997, was not aware of the neurosurgical standard of

care in Atlanta or Nashville, and could not state where the Defendant deviated from the standard of care.

We address the second issue first.

Summary judgments enable courts to conclude cases that can and should be resolved on dispositive legal issues. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Airport Props. Ltd. v. Gulf Coast Dev., Inc.*, 900 S.W.2d 695, 697 (Tenn. Ct. App. 1995). They are appropriate only when the moving party can demonstrate that no genuine issues of material fact exist and that he or she is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd*, 847 S.W.2d at 210; *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 490 (Tenn. Ct. App. 1999). Because summary judgments present pure questions of law, our review is de novo with no presumption of correctness as to the trial court's judgment. *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 44 (Tenn. Ct. App. 1993).

Medical malpractice cases may be adjudicated by summary judgment in proper circumstances. *Donnelly v. Walter*, 959 S.W.2d 166, 168 (Tenn. Ct. App. 1997); *Estate of Henderson v. Mire*, 955 S.W.2d 56, 59-60 (Tenn. Ct. App. 1997). A defendant seeking summary judgment in a medical malpractice case bears the burden of showing that no genuine issues of material fact exist and that it is entitled to a judgment as a matter of law. The defendant may meet this burden by demonstrating that the plaintiff will be unable to prove an essential element of his or her case, *Byrd*, 847 S.W.2d at 212-13, because the inability to prove an essential element of a claim necessarily renders all other facts immaterial. *Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993); *Strauss v. Wyatt, Tarrant, Combs, Gilbert & Milom*, 911 S.W.2d 727, 729 (Tenn. Ct. App. 1995). Once a defendant has negated an essential element of the plaintiff's claim, the plaintiff may not rest on his or her pleading but must respond with appropriate evidentiary materials demonstrating that there is a genuine issue of fact for trial. *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498 (Tenn. 1978); *Dellinger v. Pierce*, 848 S.W.2d 654, 656 (Tenn. Ct. App. 1992).

### III.

A plaintiff's burden of proof in a medical malpractice case is governed by statute. Tenn. Code Ann. § 29-26-115(a) (Supp.2003) requires the plaintiff to prove, through expert testimony, the following:

- (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
- (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

The trial court determined that Dr. Lippitt "simply failed to meet prongs 1 and 2 of the statute" and found it unnecessary to address the third element. We agree.

Dr. Abram's affidavit states that he complied with the recognized standard of acceptable professional practice applicable to neurosurgeons practicing in Nashville, Tennessee in 1997 and that nothing he did or failed to do caused Ms. Harris to suffer any injury that would not have otherwise occurred. Because Dr. Abram's affidavit negated the essential elements of the plaintiff's case set forth in Tenn. Code Ann. § 29-26-115(a)(1) and (2), the burden shifted to the plaintiff to set forth, through expert medical testimony, specific facts showing that a genuine issue of material fact exists as to those two elements. The dispositive issue on appeal is whether the depositions of Dr. Lippitt submitted in opposition to the defendant's motion for summary judgment establish a genuine dispute of material fact with respect to those two elements sufficient to render summary disposition inappropriate.

Dr. Lippitt is an orthopedic surgeon practicing in Atlanta, Georgia. Although orthopedic surgeons perform lumbar laminectomies, Dr. Lippitt has not performed one in over ten years but has acted as a first assistant to a neurosurgeon in such surgeries. Dr. Abrams, on the other hand, is a neurosurgeon practicing in Nashville, Tennessee. Tenn. Code Ann. § 29-26-115(a)(1) requires the plaintiff to prove, by expert testimony, "the recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred." Dr. Lippitt however discussed a national standard of care for performing a lumbar laminectomy. He conceded that he was "not aware of the neurosurgical standard of care in Nashville, Tennessee."

In addition, Dr. Lippitt presumed that Dr. Abrams deviated from the standard of care solely because Ms. Harris's bowel was injured during the surgery. However, a defendant will not be presumed negligent, and injury alone does not raise a presumption of the defendant's negligence. Tenn. Code Ann. § 29-26-115(c) & (d); *Estate of Henderson v. Mire*, 955 S.W.2d 56 (Tenn. Ct. App. 1997). The plaintiff must set forth, by expert testimony, specific facts demonstrating that the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with the recognized standard of care. Dr. Lippitt admitted he "cannot identify a single thing that Dr. Abrams did or failed to do that were deviations from the standard of care" and conceded that a bowel perforation "can happen under the best of circumstances."

We have reviewed Dr. Lippitt's depositions and have determined that they fail to set forth specific facts establishing the standard of care for neurosurgeons in Nashville, Tennessee or a similar community. Moreover, Dr. Lippitt's depositions do not set forth specific facts showing that Dr. Abrams acted with less than or failed to act with ordinary and reasonable care in accordance with the standard of care. Accordingly, Dr. Lippitt's testimony simply fails to raise a genuine issue of

material fact as to whether the requirements of Tenn. Code Ann. § 29-26-115(a)(1) and (2) have been met.

We note that we have not determined that Dr. Lippitt is incompetent to offer proof in this case pursuant to Tenn. Code Ann. § 29-26-115(b)<sup>2</sup>. Indeed, Tenn. Code Ann. § 29-26-115(b) only requires that an expert be licensed and practicing in a specialty which would make his or her testimony relevant to the issues in the case. The statute does not require an expert to practice in the same specialty as the defendant. The fact that Dr. Lippitt did not practice neurosurgery or perform laminectomies does not necessarily render him incompetent to testify regarding any of the factors set forth in Tenn. Code Ann. § 29-26-115(a). Rather, summary judgment is appropriate because the depositions of Dr. Lippitt fail to establish a genuine issue of material fact regarding either the recognized standard of care for neurosurgeons in Nashville or the failure of Dr. Abrams to act in accordance with that standard as required by Tenn. Code Ann. § 29-26-115(a).

Because the plaintiff failed to come forth with expert medical testimony establishing required elements of her case when faced with the defendant's testimony negating those elements, the trial court did not err in granting summary judgment to the defendant. In light of this conclusion, we need not address the plaintiff's other issue regarding whether the directed verdict in the prior case precludes the plaintiff from raising the same claims for lost wages, medical expenses and future medical expenses in this case.

#### IV.

We affirm the judgment of the trial court and remand the case to the trial court for such further proceedings as may be necessary. We also tax the costs of the appeal to Mary B. Harris and her surety for which execution, if necessary, may issue.

PER CURIAM

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<sup>2</sup>Tenn. Code Ann. § 29-26-115(b) provides:

No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred....

Tenn. Code Ann. § 29-26-115(a)-(b)